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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
10

11 DENNIS ALVA, ) No. CV 08-01827-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION  
14 ) AND ORDER  
15 v. )  
16 ) (Social Security Case)  
17 MICHAEL J. ASTRUE, )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
22 \_\_\_\_\_ )  
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18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and transcript of the record before  
24 the Commissioner. The parties have filed the Joint Stipulation  
25 ("JS"), and the Commissioner has filed the certified Administrative  
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") erred in his

1 analysis of the vocational issues and whether the testimony  
2 of the vocational expert is flawed;

3 2. Whether the ALJ's analysis of Plaintiff's testimony and  
4 subsequent rejection of that testimony is legally  
5 sufficient; and

6 3. Whether the ALJ gave appropriate weight to the opinions of  
7 Plaintiff's treating physicians and evaluated all of the  
8 medical evidence.

9 (JS at 3.)

10  
11 This Memorandum Opinion will constitute the Court's findings of  
12 fact and conclusions of law. After reviewing the matter, the Court  
13 concludes that the decision of the Commissioner must be affirmed.

14  
15 I

16 **THERE IS NO ERROR AT STEP FIVE OF THE SEQUENTIAL EVALUATION**

17 At Step Five of the sequential evaluation process (see 20 C.F.R.  
18 §404.1520(a)), after it is determined at the preceding step that the  
19 claimant may not perform his or her past relevant work (see 20 C.F.R.  
20 §404.1520(f)), the ALJ must determine whether the claimant is able to  
21 do any other work considering his residual functional capacity  
22 ("RFC"), age, education, and work experience. If other specific work  
23 is identified, the individual is found to be not disabled.

24 In this case, the ALJ adopted the testimony of a vocational  
25 expert ("VE") at the hearing that, at Step Five, there were jobs in  
26 the national economy which were identified as being available to  
27 Plaintiff.

28 Plaintiff challenges the Step Five finding, and the Court has

1 discerned the following issues contained within this challenge:

- 2 1. That the jobs identified do not specifically allow Plaintiff  
3 the opportunity to "lie down during lunch breaks," which was  
4 included within the RFC as determined by the ALJ. (See AR at  
5 19.) Essentially, Plaintiff appears to be asserting that  
6 because of an inability to lie down during lunch breaks, the  
7 identified jobs constitute a deviation from the descriptions  
8 contained in the Dictionary of Occupational Title ("DOT"),  
9 which deviation is not sufficiently explained in the  
10 testimony of the VE;
- 11 2. That the identified jobs are not appropriately classified as  
12 "light" exertional work based on the VE's testimony;
- 13 3. As to one of the jobs (information clerk) identified at Step  
14 Five, there is a deviation because this occupation  
15 assertedly requires "significant standing and/or walking"  
16 which exceeds the RFC as determined by the ALJ. (See AR at  
17 19, JS at 5.)

18  
19 **A. Applicable Law.**

20 Under applicable regulations, the Commissioner takes  
21 administrative notice of reliable job information available from  
22 various governmental and other publications, which includes the DOT.  
23 (See 20 C.F.R. §404.1566(d)(1)); Massachi v. Astrue, 486 F.3d 1149,  
24 1152, n.8 (9<sup>th</sup> Cir. 2007).)

25 The Ninth Circuit had occasion to extensively discuss the matter  
26 of job requirements which deviate from DOT descriptions, in the case  
27 of Johnson v. Shalala, 60 F.3d 1428 (9<sup>th</sup> Cir. 1995). There, the VE  
28 identified occupations classified in the DOT as "light" work, which is

1 considered a more strenuous exertional category than "sedentary."  
2 Although the ALJ had determined that the claimant in that case was  
3 capable of only sedentary work (see 60 F.3d at 1431, n.1), the ALJ  
4 adopted the VE's identification of the two available jobs at Step  
5 Five, which had an RFC requiring the ability to perform light work.  
6 The appellate court rejected the argument that the claimant in that  
7 case was precluded from performing these jobs because she did not have  
8 the exertional RFC to perform light work, but only sedentary work.  
9 The Court held that its prior decision in Terry v. Sullivan, 903 F.2d  
10 1273, 1277 (9<sup>th</sup> Cir. 1990),

11 "[S]upport[ed] the proposition that although the DOT raises  
12 a presumption as to the job classification, it is  
13 rebuttable. We make explicit here that an ALJ may rely on  
14 expert testimony which contradicts the DOT, but only insofar  
15 as the record contains persuasive evidence to support the  
16 deviation."

17 (Id. at 1435.)

18  
19 Further, the appellate court noted that the DOT is not the only  
20 source of admissible information concerning jobs (Id. at 1435, citing  
21 Barker v. Shalala, 40 F.3d 789, 795 (6<sup>th</sup> Cir. 1994)), but that the  
22 Commissioner may take notice of reliable job information, including  
23 the services of a vocational expert. (Id., citing Whitehouse v.  
24 Sullivan, 949 F.2d 1005, 1007 (8<sup>th</sup> Cir. 1991).)

25 Finally, the Ninth Circuit cited with approval the opinion of a  
26 Sixth Circuit panel in Conn v. Secretary of Health and Human Services,  
27 51 F.3d 607, 610 (6<sup>th</sup> Cir. 1995) for the proposition that,

28 "The Sixth Circuit recently held in a case similar to

1       ours, that "the ALJ was within his rights to rely solely on  
2       the vocational expert's testimony. The Social Security  
3       regulations do not require the Secretary or the expert to  
4       rely on classifications in the Dictionary of Occupational  
5       Titles." (Citing Conn, 51 F.3d at 610.)  
6       (60 F.3d at 1435.)

7  
8       **B. Analysis.**

9       The ALJ adopted the VE's conclusion that Plaintiff could perform  
10      the following jobs:

- 11       1. Assembler, Small Products I (any industry), Code 706.684-  
12       022;
  - 13       2. Information Clerk, Code 237.367-018; and
  - 14       3. Cashier II (Clerical), Code 211.462-010.
- 15      (AR 21.)

16  
17      Plaintiff complains that there is no basis for the conclusion  
18      that these jobs both require "light" exertion. But the simple and  
19      dispositive answer is that the DOT itself classifies each of these  
20      jobs as requiring light exertion. There is no deviation which would  
21      require specific or expert testimony.

22      Plaintiff also argues (see JS at 5) that the identified job of  
23      Information Clerk requires "significant standing and/or walking  
24      required of this job," which exceeds the ALJ's determination that  
25      Plaintiff is capable of standing and/or walking three to four hours  
26      out of eight in a workday. (See AR at 19.) But, again, this argument  
27      is easily controverted by reference to the DOT itself, in which the  
28      job description is fully described as follows:

1 "Provides travel information for bus or train patrons:  
2 Answers inquiries regarding departures, arrivals, stops, and  
3 destinations of scheduled buses or trains. Describes  
4 routes, services, and accommodations available. Furnishes  
5 patrons with timetables and travel literature. Computes and  
6 quotes rates for interline trips, group tours, and special  
7 discounts for children and military personnel, using rate  
8 tables."

9  
10 Finally, the Court will address Plaintiff's assertion that these  
11 jobs are not available to him because, as the ALJ found, he must be  
12 afforded the opportunity to lie down during lunch breaks, and there is  
13 no indication in these job descriptions that this would be available  
14 to Plaintiff. The Court would note from its perusal of the many jobs  
15 set forth in the DOT that none of these jobs reference whether an  
16 individual would be permitted to lie down during a lunch break. The  
17 logical extension of Plaintiff's argument is that he is disabled  
18 because there cannot be a showing that he would be allowed to lie down  
19 during a lunch break in any job. In any event, it is a pertinent  
20 question to ask whether identification of these three jobs at Step  
21 Five constitutes a "deviation" from the job descriptions contained in  
22 the DOT. The Commissioner's answer in the JS is that the VE testified  
23 that Plaintiff could lie down in his car during lunch breaks, and the  
24 record demonstrates that Plaintiff does own a car. (JS at 6.) In  
25 Plaintiff's Reply to this argument, he argues that there was no  
26 specific evidence that he could actually lie down in his car, because  
27 there would be no indication as to where he could park it, and similar  
28 information. The Court determines that this is a de minimis argument.

1 As indicated, none of the job descriptions in the DOT address whether  
2 an individual can lie down during a lunch break. The VE was certainly  
3 testifying within his expertise when he asserted that Plaintiff would  
4 be able to lie down, if that were a limitation, and could still  
5 perform these jobs. The Court does not perceive that the necessity of  
6 lying down during a lunch break, for some unspecified amount of time,  
7 constitutes a deviation from a DOT job title which requires specific  
8 expert testimony.

9 For the foregoing reasons, the Court determines that there is no  
10 merit to Plaintiff's first issue.

## 11 12 II

### 13 **THE ALJ DID NOT ERR IN DEPRECIATING PLAINTIFF'S CREDIBILITY**

14 In his second issue, Plaintiff asserts that the ALJ erred in  
15 depreciating his credibility as to excess pain. Indeed, the ALJ  
16 concluded, generally, that Plaintiff's statements concerning the  
17 intensity, persistence and limiting effects of the symptoms "are not  
18 credible to the extent they are inconsistent with the [RFC] for the  
19 reasons explained below." (AR 20.)

#### 20 21 **A. Applicable Law.**

22 Subjective complaints of pain or other symptomology in excess of  
23 what an impairment would normally be expected to produce are subject  
24 to the credibility assessment of an ALJ. Rollins v. Massanari, 261  
25 F.3d 853, 856-57 (9<sup>th</sup> Cir. 2001). An ALJ's assessment of pain severity  
26 and claimant credibility is entitled to "great weight." Weetman v.  
27 Sullivan, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989); Nyman v. Heckler, 779 F.2d  
28 528, 531 (9<sup>th</sup> Cir. 1985). When determining credibility, the ALJ "may

1 not reject a claimant's subjective complaints based solely on a lack  
2 of objective medical evidence to fully corroborate the alleged  
3 severity." Bunnell v. Sullivan, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991); see  
4 also, Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9<sup>th</sup> Cir. 2001). In  
5 order to find that a claimant's subjective complaints are not  
6 credible, an ALJ "must specifically make findings that support this  
7 conclusion," Bunnell, 947 F.2d at 345, and provide "clear and  
8 convincing reasons." Rollins, 261 F.3d at 857; see also Varney v.  
9 Secretary of Health & Human Services, 846 F.2d 581, 584 (9<sup>th</sup> Cir. 1988)  
10 (requiring the ALJ to put forward "specific reasons" for discrediting  
11 a claimant's subjective complaints).

12 The absence of objective evidence to corroborate a claimant's  
13 subjective complaints, however, does not by itself constitute a valid  
14 reason for rejecting her testimony. Tonapetyan v. Halter, 242 F.3d at  
15 1147. However, weak objective support can undermine a claimant's  
16 subjective testimony of excess symptomology. See e.g., Tidwell v.  
17 Apfel, 161 F.3d 599, 602 (9<sup>th</sup> Cir. 1998).

18 Implementing regulations prescribe factors which should be  
19 considered in determining credibility as to self-reported pain and  
20 other symptoms. In 20 C.F.R. §404.1529(c)(3), the factors to be  
21 considered are specified to include a claimant's daily activities  
22 ("ADL"); the location, duration, frequency and intensity of pain or  
23 other symptoms; precipitating and aggravating factors; the type,  
24 dosage, effectiveness and side effects of any medication taken;  
25 treatment received; and measures taken to relieve pain.

26 The regulations also specify that consideration should be given  
27 to inconsistencies or contradictions between a claimant's statements  
28 and the objective evidence:

1            "We will consider your statements about the intensity,  
2            persistence, and limiting effects of your symptoms, and we  
3            will evaluate your statements in relation to the objective  
4            medical evidence and other evidence, in reaching a  
5            conclusion as to whether you are disabled. We will consider  
6            whether there are any inconsistencies in the evidence and  
7            the extent to which there are any conflicts between your  
8            statements and the rest of the evidence, including your  
9            history, the signs and laboratory findings, and statements  
10           by your treating or nontreating source or other persons  
11           about how your symptoms affect you."

12        (20 C.F.R. §404.1529(c)(4).)

13  
14           **B.    Analysis.**

15           The ALJ relied upon the following factors in assessing  
16        Plaintiff's credibility with regard to excess pain complaints:

- 17           1.    Contrasting the objective medical evidence with Plaintiff's
- 18                  claim;
- 19           2.    The nature and extent of Plaintiff's activities of daily
- 20                  living ("ADL"); and
- 21           3.    Plaintiff's own statements regarding the extent of his pain.

22  
23           First, Plaintiff clearly testified at the hearing that he has  
24        learned to tolerate his back pain. (AR 41.) Certainly, this is  
25        relevant in the credibility analysis, and while Plaintiff contends  
26        that the ALJ did not rely upon this factor, it is clear that the ALJ's  
27        determination specifically cited Plaintiff's own statements. (AR 20.)

28           The ALJ made extensive observations about the nature and extent

1 of Plaintiff's ADL. This is a legitimate and relevant factor in  
2 determining whether subjective pain complaints are to be accorded full  
3 credibility, according to regulations and case law. Indeed, Plaintiff  
4 does not seem to argue the relevance of this point, but instead  
5 focuses on Plaintiff's statement that he spends significant time  
6 sitting, stretched out, or that he sometimes naps during the day. (AR  
7 20.) The ALJ acknowledged these claims as part of Plaintiff's  
8 subjective contentions; however, this does not depreciate the  
9 applicability of the ALJ's consideration of Plaintiff's ADL. (See AR  
10 at 39, 181, 278-280.) In essence, Plaintiff's assessment of his own  
11 exertional limitations is significantly more conservative than the  
12 exertional ability required for the ADL which Plaintiff conceded he is  
13 able to do.

14 The Court finds that the ALJ did not fall short of requirements  
15 under regulations and Social Security rulings (e.g., S.S.R. 96-7p, and  
16 96-8p) in determining to depreciate Plaintiff's credibility. The  
17 reasons provided are supported by the record and are sufficient  
18 indicia to support a credibility finding. Consequently, Plaintiff's  
19 second issue has no merit.

### 20 21 III

#### 22 THE ALJ DID NOT ERR IN HIS EVALUATION OF THE OPINIONS 23 OF PLAINTIFF'S TREATING PHYSICIANS

24 In Plaintiff's third issue, he asserts that the ALJ failed to  
25 give specific and legitimate reasons to reject the opinion of his  
26 treating orthopedist, Dr. Yegge, during a period of time in which Dr.  
27 Yegge found Plaintiff to be temporarily totally disabled. (JS at 12-  
28 13.)

1 Plaintiff asserts that, for example, the ALJ failed to consider  
2 a December 1, 2004 opinion of Dr. Yegge in which it was opined that  
3 Plaintiff was permanent and stationary. (JS at 12, citing AR 243.) In  
4 fact, that citation is to a September 19, 2007 report of Dr. Dasika.  
5 Further, as the Commissioner notes (see JS at 14, n.3), as of November  
6 2004, Dr. Wood took over treatment of Plaintiff from Dr. Yegge, at  
7 Kaiser. The report of November 11, 2004 indicates that Dr. Yegge is  
8 no longer with the office. (AR 292.) Nevertheless, it would appear  
9 that Dr. Wood found Plaintiff to be temporarily totally disabled on  
10 October 18, 2004. (AR 299.)

11 While Plaintiff complains that the ALJ failed to at all discuss  
12 records from his treating physicians at Kaiser Permanente (see JS at  
13 12), in fact, the ALJ noted that Dr. Crane of Kaiser rendered an  
14 opinion in December 2003 that Plaintiff did not have any limiting  
15 conditions, and that no further followup would be necessary. (AR 20,  
16 414.)

17 An examination of Dr. Yegge's treatment notes from January 2004  
18 indicated that Plaintiff was diagnosed with condromalacia. (AR 317-  
19 327.) But, Dr. Yegge also noted during his examination that Plaintiff  
20 could perform a full squat, and his straight leg raising was negative.  
21 (AR 322-325.) The remainder of the examination in the lumbar spine  
22 and knee areas was essentially normal. (AR 322-325.) The ALJ so noted  
23 in his decision. (AR 20.) Clearly, the opinion of Dr. Wood that  
24 during the time of this examination, Plaintiff was temporarily  
25 disabled was controverted by the examinations and conclusions of Dr.  
26 Yegge and Dr. Yogaratham. (AR 334-340.) These conclusions were based  
27 on independent examinations.

28 The ALJ also relied upon the testimony of the medical expert

1 ("ME") (AR 31-36), whose conclusion was that Plaintiff was not  
2 disabled, based upon his examination of the medical records. The ALJ  
3 was entitled to rely upon the non-examining ME, whose testimony was  
4 supported by other evidence in the record and was consistent with it.  
5 See Morgan v. Commissioner of Social Security Administration, 169 F.3d  
6 595, 600 (9<sup>th</sup> Cir. 1999).

7 Thus, the Court concludes that the ALJ properly weighed the  
8 somewhat conflicting medical evidence, concluded thereupon that  
9 Plaintiff was not disabled, and adopted an RFC which was reasonably  
10 supported by Plaintiff's examining and treating doctors. For these  
11 reasons, even though the ALJ did not specifically mention Dr. Wood's  
12 statement about Plaintiff being disabled, he did in fact adequately  
13 consider all of the medical evidence in reaching his conclusion. Any  
14 error which might lie in the failure to specifically discuss Dr. Wood  
15 is harmless. See Curry v. Sullivan, 925 F.2d 1127, 1131 (9<sup>th</sup> Cir.  
16 1990).

17 For the foregoing reasons, the Court finds no error with regard  
18 to Plaintiff's third issue.

19 The decision of the ALJ will be affirmed. The Complaint will be  
20 dismissed with prejudice.

21 **IT IS SO ORDERED.**

22  
23 DATED: September 15, 2009

\_\_\_\_\_/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE